Supreme Court, U.S.
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In the Supreme Court of the United States
OCTOBER TERM, 1996

Bud Riggins and Donald McVean, *Petitioners*

v.

United States of America, *Respondent*

On Petition for a Writ of Certiorari to the Untied States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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71 pp

QUESTIONS PRESENTED

1. Whether petitioners were correctly denied a new trial, despite the government's failure to disclose material, exculpatory evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and *Kyles v. Whitley*, 115 S.Ct. 1555 (1995) in response to repeated explicit defense requests, on the ground that the petitioners should have learned the information elsewhere?

2. Does placing the burden of "due diligence" on the defense after the government has refused to turn over evidence, that is both key to the government's theory of criminal liability and the key to finding exculpatory evidence, until after the jury is sworn impermissibly permit "foul play" by the government?

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PETITION FOR A WRIT OF CERTIORARI

Bud Riggins and Donald McVean respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The *per curiam* opinion of the United States Court of Appeals for the Sixth Circuit was entered on February 13, 1997, is unpublished (107 F.3d 872) and is included in the Appendix at 1a. Petitioners, Bud Riggins and Donald McVean, filed a joint petition for rehearing which was denied, without opinion, on March 21, 1997, and is included in the Appendix at 32a. The district court's order is unpublished and is included in the Appendix at 7a. The opinion of the Sixth Circuit from the first appeal in this case is unpublished (16 F.3d 1223 (6th Cir. 1994)) and is included in the Appendix at 10a. The Judgment of Acquittal entered by the district court which lead to the first appeal is unpublished and is included in the Appendix at 30a.

JURISDICTION

The Court of Appeals entered its judgment on February 13, 1997. Appendix at 1a. A timely petition for rehearing was denied on March 21, 1997. Appendix at 32a. This petition for a writ of certiorari is accordingly due on June 19, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in relevant part,

> No person shall be ... deprived of life, liberty, or property, without due process of law....

Rule 33 of the Federal Rules of Criminal Procedure provides in pertinent part:

> The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice.... A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case.

STATEMENT OF THE CASE

This petition involves a federal criminal case for which jurisdiction in the district court was evoked pursuant to 18 U.S.C. § 3231.

Petitioners were initially indicted in the Western District of Kentucky on July 2, 1991. A seven count superseding indictment was filed on March 2, 1992, charging the petitioners, *inter alia*, with conspiracy to manufacture 3,4-

methylenedioxyamphetamine (MDA), attempt to manufacture MDA, and possession of a triple neck flask with intent to manufacture MDA. These are the only charges related to this petition.[1]

Following the trial, the district court entered a judgment of acquittal as to the three counts related to MDA. The Sixth Circuit, in an unpublished opinion, reversed. Appendix at 10a. This court denied certiorari. *Riggins v. United States*, ___U.S. ___, 115 S.Ct. 187, 130 L.Ed.2d 120 (1994). The district court then granted petitioners' motion for a new trial which is the subject of the instant appeal.

This matter began when the petitioners ordered a chemical, isosafrole, from Eastman Kodak Fine Chemicals in Rochester, New York. Although there were no restrictions on the sale or purchase of isosafrole at the time, isosafrole had been placed on a informal watch list. As a result of the order by Riggins and McVean, Eastman contacted the Drug Enforcement Agency office in Rochester. This contact ultimately culminated in a search of Riggins' mother's farm in Adairville, Kentucky which revealed that petitioners had in their possession forty-one different chemicals and assorted laboratory equipment each piece of which was largely incompatible with the other pieces.[2]

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[1]Mr. Riggins was originally indicted on seven counts and was acquitted of all other charges. Mr. McVean was indicted on five counts and was found guilty of being a convicted felon in possession of a firearm and has since served that sentence. Petitioner McVean's conviction for possession of a weapon is not at issue in this petition.

[2]Petitioners testified during trial and presented supporting proof that they were in the retail chemical business and in the process of cataloging and acquiring various chemicals for that purpose.

The prosecution's case was entirely circumstantial based upon the mere possession of these chemicals and equipment. No MDA was seized, a lab was not in operation and there was no evidence of the actual sale or manufacture of MDA or any other controlled substance.

The government based the prosecution on the theory that seven of the forty-one chemicals could be used, among hundreds of other uses, in the synthesis of MDA using what the government's chemist, in his Clandestine Lab Seizure Report, described as synthesis route I, in the DEA Clandestine Lab Guide for Agents and Chemists, pages 93-95. The trial proof indicated that at least two ingredients critical to the manufacture of MDA using this synthesis route were not present.[3]

Petitioners, through their counsel, spent the year between their indictment and their trial seeking the formula by which the government was alleging they were planning to make the illicit substance from chemicals which were legal to possess. They insisted that they had been organizing a legitimate resale chemical business, had no idea how to make MDA from isosafrole, and thus needed the synthesis route to understand the basis of the government's allegation that they purchased the isosafrole for the purpose of manufacturing MDA. Despite repeated requests, including a motion to compel discovery, the government did not disclose this chemical formula until the second day of trial.

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[3]Of critical importance to the district court was the absence of any base. Appendix at 22a. The government's proposed synthesis route created an acidic solution that required the addition of a base to make the solution alkaline in order to produce the final product.

Riggins' and McVean's convictions for conspiracy, attempt and possession of a triple neck flask with intent to manufacture MDA were initially overturned by the trial court for insufficiency of the evidence, but reinstated by the Sixth Circuit. Appendix at 30a; 10a.

After the trial, while awaiting the outcome of the government's appeal, the defendants for the first time had an opportunity to analyze DEA synthesis route one.[4] Using this newly obtained direct access to the synthesis route, petitioners then discovered scientific articles and materials - some of which had been referenced at trial by the government's expert - which noted the difficulty in making MDA with synthesis route one, the low yield it would produce, the need for very specialized equipment and knowledge and, thus, rejected the likelihood of the illicit use of this formula the government had claimed at trial. The trial judge granted a new trial based on this newly discovered evidence and found a *Brady* violation in the extraordinarily delayed disclosure of the formula. Appendix at 7a-9a. The Sixth Circuit found an abuse of discretion in the grant of a new trial, holding that petitioners failed to exercise due diligence by not finding these articles earlier, despite having no basis to have sought them. Appendix at 6a.

1. The petitioners were accused of preparing to operate a clandestine drug laboratory in Western Kentucky in 1991, and

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[4]Although the synthesis route was provided to the defense by the second day of trial, the protective order prevented the defendants themselves from being given access to the document. Appendix at 34a. Despite the super secrecy that the prosecution asserted to deny the synthesis route to the defense before trial and to justify the protective order denying access to the defendants themselves during trial, the government inserted the synthesis route into the joint appendix on appeal thus making it directly available for the first time to Mr. Riggins and Mr. McVean.

were ultimately convicted of three charges relating to the manufacture of "3,4-methylenedioxyamphetamine" ("MDA"): conspiracy, attempt to manufacture an hallucinogen and possession of triple neck laboratory flasks with the intent to manufacture this hallucinogen. Verdict Form, J.A. at 172-173.[5] The petitioners never denied possessing various legal chemicals, some of which allegedly could be used to synthesize illicit substances, but maintained that they were planning to legitimately enter the chemical resale business. Since the government conceded no illicit substances were ever present or manufactured, no illegal synthesis of substances had ever occurred and no statements concerning illicit purposes of the operation had been made, this "purely circumstantial case" turned upon the petitioners' intent, (district court order Appendix at 8a), and the actual method by which petitioners were alleged to have intended to synthesize MDA was thus the principal issue in the case (clandestine lab seizure report at J.A. at 149-50).

2. For one full year prior to trial, defense counsel had sought the chemical description of the synthesis "route" by which petitioners - according to the report of the DEA chemist who inspected the property - were alleged to have intended to make MDA. "I would appreciate your providing us with the DEA Clandestine Lab Guide for Agents and Chemists, at least those pages referenced," petitioners' counsel wrote to the prosecutor on September 4, 1991. J.A. at 48-9. Six months later, on April 3, 1992 (still six months prior to trial), petitioners' counsel again wrote to the prosecutor:

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[5]References to the record are to the Joint Appendix filed in the Sixth Circuit ("J.A."), the Trial Transcript ("T.T.") with volume and page numbers, or the one volume transcript of the hearing on Petitioners' Motion for a New Trial ("N.T.T.").

> As you know, for some time we have been attempting to discover the synthesis route which the government contends was used or was intended to be used in this matter which is described in the lab report... I do believe, however, that we are entitled to a full description of the synthesis route that the government contends was utilized or intended to be utilized in this matter.

J.A. at 44-5. Three months prior to trial, on June 16, 1992 counsel filed a motion to compel pretrial discovery, seeking this information.

> Without the knowledge of the synthesis route alleged, chemists retained by the defendant have no ability to determine the accuracy of these figures as the number of steps required to produce MDA is critical in the calculation of the quantity created...Therefore, it is absolutely imperative that defendants be notified of the route alleged by the government in order to prepare for the trial of this matter....Defendant would settle for notification of the exact synthesis route alleged in this case.

Motion to Compel, J.A. at 38.

3. Five weeks before trial, the Government responded that the material sought was not discoverable pursuant to Rule 16 of the Federal Rules of Criminal Procedure, that it was impeachment material of a Government expert - so unavailable until after he testified, that disclosure was impermissible because of its "DEA Sensitive" classification and, finally, that it was not exculpatory *Brady* material. United States' Response to Motion to Compel, J.A. 159-166. The

government declared, "it is the United States that decides which information must be disclosed pursuant to *Brady*.... If any exculpatory evidence as defined in *Brady* and its progeny comes to light, the Untied States will disclose such evidence in time for trial." *Id.*, at 166.

4. Trial commenced on September 3, 1992, pretrial motions were heard, the jury was empaneled and sworn, the parties made their opening statements and, at the end of the day, the trial judge ordered production of the requested material and signed the protective order. Appendix at 34a. Five days later the protective order was filed on September 8, 1992, (Id.) and the material was disclosed the day the government began proof in its case-in-chief.[6]

The government's case against the petitioners was purely circumstantial, and consisted principally of the testimony of a DEA chemist that the petitioners' intent could be inferred from the presence of certain chemicals. DEA chemist Odiest Washington testified that despite finding forty-one chemicals which were legal to possess at petitioner Riggins' property, he concluded that eight of them could be used to make MDA through a particular synthesis route.[7] During cross

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[6]The trial court found that the synthesis route was provided to the defense some time between September 3, 1992 and September 8, 1992. Appendix at 8a. Although the protective order was signed by the judge on September 3, 1992, it was not filed until September 8, 1992. Appendix at 8a, 35a. With regard to the issue of due diligence in the utilization of the material and whether as found by the Sixth Circuit the defense should have moved for a continuance upon getting the synthesis route, it is sufficient to note that there is no question that the synthesis route was not provided to the defense until after the jury was sworn and jeopardy attached.

[7]Although the chemist testified to eight, in reality there were only seven. This, in fact, is one of the instances in which the government's

examination, he mentioned for the first time the "Leuckhart" reaction as part of this process. Subsequent investigation by the defense led to the discovery of an article by a Senior Chemist in the same government lab in which the testifying chemist, Odiest Washington, worked which concluded that the synthesis route involving the "Leuckhart" reaction was "more time consuming, [would] require greater laboratory skills, generally result in poorer yields, and thus [was] ... *less likely to be used* [in clandestine laboratories]." Dal Cason article, J.A. at 57. (Emphasis supplied).

Washington also testified that the two key chemicals which aroused his suspicion were the "precursor chemicals" isosafrole and formamide. T.T. at 3-17 - 3-19. Isosafrole was "a tip," despite its having many legitimate uses, "in the elicit [sic] field it's used for the manufacture of MDA." *Id.* Formamide was the other chemical on the DEA list required to make MDA. T.T. at 3-49. The synthesis route which the government alleged the petitioners intended to use was apparently discovered by two Japanese scientists in the 1950's. T.T. 3-63 - 64. When the petitioners were finally able to locate the chemical abstracts for the particular route after the trial, they discovered that one of them did not require the "precursor" chemical on which the government had relied, and that both required sophisticated chemical apparatuses which were absent

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chemist stretched his testimony beyond credulity. The video tape of the kitchen of the house searched depicted a can of hardware grade acetone, a common cleaning solvent, on the counter. The chemist did not find this chemical of sufficient importance to put it on the inventory of the search or to seize it for further analysis or testing. Moreover, the chemist did not even note whether the can was full or empty. Riggins testified it was used for cleaning and at the time of the search the can was empty.

from the site.[8] N.T.T. at 36-38. None of this was known at the time of the trial. The district court later characterized chemist Washington's testimony as "weak. It was an after the fact construction." N.T.T. at 73.

5. On September 15, 1992, the petitioners were convicted of conspiracy to manufacture MDA, attempt to manufacture MDA and possession of triple neck laboratory flasks with the intent to manufacture MDA. On September 24, 1992, they sought a judgment of acquittal and/or a new trial, based on insufficiency of the evidence regarding their intent. On December 11, 1992, the district court granted this motion, Appendix 17a, 21a, finding that

> for a conviction of conspiracy or for a conviction for intent it's not necessary that the act be completed, that MDA be finally manufactured or that they even have the ability to complete the effort to manufacture MDA....But in those cases there was, there was evidence, other evidence of specific intent rather than the mere inference of specific intent from the presence of the chemicals. And that's all we have here, counsel. Some of the necessary ingredients for manufacture of MDA were present.

Appendix at 23a (Sixth Circuit 1994 opinion quoting district court)..

6. The government appealed, and the court of appeals reversed, finding the trial court had erred in granting the

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[8]In fact, MDA is not an end product of either chemical abstract. Rather, it is an interim product created in the process described in the abstracts.

judgment of acquittal. Appendix at 11a. After unsuccessfully seeking a writ of certiorari in this Court, *United States v. Riggins*, cert. denied, 115 S.Ct. 187 (1994), the petitioners renewed their motion for a new trial, J.A. at 210 - 236, and filed a second motion for new trial based on newly discovered evidence concerning the chemical formula or "synthesis route" for the substances they were alleged to have intended to make, which was specifically sought by the petitioners for over a year prior to trial and was withheld by the government until the second day of trial. J.A. at 17.

7. The district court found that the evidence, several scientific articles which undermined the testimony of the government's expert witness concerning the synthesis route, was material and exculpatory, and would have been discovered had the government timely disclosed the synthesis route to the petitioners.

> I am left with the inescapable conclusion, however, that the witness [sic][9] of Mr. Odiest Washington's testimony and the strength of the defense witnesses Green and the other Ph.D. might have been enhanced. Indeed, I'm left with the inescapable conclusion that their testimony would have been enhanced if the government had complied with the request made initially March 18th and subsequently on April 30th in writing that the synthesis route which the government intended to attempt to prove and which the government felt had been employed or was conspired to be employed, whatever, by the defendants to make a specific exotic mean [sic] was to be used.

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[9]The court presumably said "weakness".

> That being the case, I don't think there's any question but what *Brady* was violated.

N.T.T. at 74. It therefore granted them a new trial.[10] Appendix at 7a-9a. The government appealed.

8. The Sixth Circuit again reversed the trial court finding an abuse of discretion, this time because the petitioners failed to exercise due diligence in not discovering the articles prior to trial. Appendix at 6a. The Sixth Circuit did not question that material, exculpatory evidence had been withheld. Its opinion rested entirely on the proposition that these materials were available elsewhere and could have been found with the exercise of due diligence, so there could be no newly discovered exculpatory evidence which would qualify for a new trial. According to the Sixth Circuit, "[a]ny holding to the contrary would allow criminal defendants to research academic literature after their convictions and move for new trials whenever their research revealed useful articles."[11] Appendix

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[10]The district court ruled in writing that the withholding "may well have violated Brady and Agurs requirements for exculpatory materials. Brady v. Maryland, 373 U.S. 83 (1963), U.S. v. Agurs, 427 U.S. 97 (1975)." Whether the withheld evidence was exculpatory, however, was moot once the District Court granted Defendant's Motion for a New Trial.

[11]This reasoning ignores entirely the government's continuous refusal to provide the defense relevant, impeaching and exculpatory evidence. It further ignores the protective order that explicitly prohibited so much as showing the synthesis route upon which the prosecution was based to the defendants themselves under threat of criminal contempt. *See*, Protective Order, Appendix 34a, 35a. The government later, in its appeal of the judgment of acquittal placed this "DEA Sensitive" document, that they refused to timely provide the defense, into the open public record in the joint appendix in the Sixth Circuit. It was through this source that Mr. Riggins obtained access to the document and found a chemist at Vanderbilt

at 6a.

REASONS FOR ALLOWING THE WRIT

The petitioners were convicted in a "purely circumstantial case" of crimes of conspiracy and attempt. Appendix at 21a-23a. The government's "key witness" was a DEA chemist who testified that some of the chemicals and equipment found in the defendants' possession could be used in combination with chemicals and equipment not found in the defendants' possession to manufacture MDA through a particular chemical synthesis process. *Id.* The synthesis route, though aggressively sought by the petitioners for a year prior to trial, was not disclosed until the second day of trial. Although the government's chemist inferred MDA could be made with the government's proffered synthesis route using substitute chemicals and household equipment that would have been available to the defendants, in fact, according to an article by a senior government chemist, this formula and chemical reaction would be very *unlikely* to be used to illicitly manufacture this substance. Moreover, these aspects of the reaction and the synthesis route were known to the Government's key witness - but undiscovered by the petitioners because they had just been given the formula - *when the Government's expert testified.*

The Sixth Circuit did not dispute the trial court's finding that this formula was material and exculpatory, nor did it dispute that the new evidence was discovered after trial or that

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University who ultimately found the evidence presented in the hearing on the New Trial Motion. By reversing the district court, the Sixth Circuit encourages the government's foul play.

it would have likely produced an acquittal. It simply concluded that the due diligence exception precludes the grant of a new trial, even based on newly discovered exculpatory evidence, when the evidence could have been discovered elsewhere.

A. The Sixth Circuit's Due Diligence Exception to *Brady* Reflects a Conflict Among the Circuits.

1. In a motion for a new trial based on newly discovered evidence pursuant to Rule 33 of the Federal Rules of Criminal Procedure, all circuits require that the evidence be "newly discovered," such that it could not have been discovered earlier with "due diligence," that it is material and that it either would "likely" produce an acquittal or would "probably" produce one. See, e.g., *U.S. v. Wright*, 625 F.2d 1017, 1019 (1st Cir. 1980), *U.S. v. Alessi*, 638 F.2d 466, 479 (2d Cir. 1980), *U.S. v. O'Dell*, 805 F.2d 637, 640 (6th Cir. 1986). The Sixth Circuit has long held that the defendant's obligation to use "due diligence" means that the government need not disclose exculpatory evidence if the defendant could obtain the evidence from another source. *See*, *U.S. v. Todd*, 920 F.2d 399, 405-6 (6th Cir. 1990), *U.S. v. Clark*, 928 F.2d 733, 738 (6th Cir. 1994), *U.S. v. Mullins*, 22 F.3d 1365, 1371 (6th Cir. 1994) and *U.S. v. Schledwitz*, 86 F.3d 73, 75 (6th Cir. 1996).

Based on this rule, the Court rejected petitioners' claims that the scientific articles undermining the testimony of the government's expert witness entitled them to a grant of a new trial because the articles had been published at least two years before their trial, thus the petitioners' experts "could have identified any relevant articles on the process in preparation for their trial testimony.... Because the defendants failed to demonstrate that the articles in question could not have been

discovered with due diligence, ... the district court abused its discretion by granting the defendants' motion for a new trial." Appendix at 6a.

2. Other circuits also apply this due diligence exception to the standard for the grant of a new trial pursuant to Rule 33. The Fourth Circuit recognized a "due diligence" exception in a divided opinion in *Barnes v. Thompson*, 58 F.3d 971 (4th Cir. 1995). In *Barnes,* the Court vacated a grant of habeas relief based on a *Brady* violation because, despite the government's failure to honor a *Brady* request, "*Brady* requires that the government disclose only evidence that is not available to the defense from other sources, either directly or through diligent investigation." 58 F.3d 975, n.4. The Court explained that nondisclosure "does not denote that no exculpatory evidence exists, but that the government possess no exculpatory evidence that would be unavailable to a reasonably diligent defendant." *Ibid.* This holding was criticized by Judge Murnaghan, who concurred in the judgment on other grounds. He cogently noted that "a reasonable defendant would not have looked into the matter any further once the prosecuting attorney represented that the [government] did not possess exculpatory evidence." 58 F.3d at 984.

Despite arguments by the government to the contrary, the Fourth Circuit has limited the due diligence exception to cases in which the evidence was at least available before the conclusion of the defendant's case-in-chief. *U.S. v. Kelly*, 35 F.3d 929, 937 (4th Cir. 1994). Several other circuits have recognized the due diligence exception. *U.S. v. Wright*, 625 F.2d 1017, 1019 (1st Cir. 1980); *U.S. v. Jaramillo*, 42 F.3d 920, 935 (5th Cir. 1995); *Zeitvogel v. Delo*, 84 F.3d 276, 279-80 (8th Cir. 1996)(similar rule regarding lack of "cause" to excuse procedural default in habeas corpus if information "reasonably

available through other means"); *U.S. v. Davis*, 787 F.2d 1501, 1505 (11th Cir. 1986)("*Brady* rule does not apply if the evidence in question is available to the defendant from other sources").

3. The Tenth Circuit, however, rejected this rule in *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995). In *Banks*, the government failed to disclose that two other persons had previously been charged with the offense for which the defendant was ultimately convicted. One of these persons had been represented by the defendant's lawyer in the previous case, thus - the government argued - the lawyer should have been aware of the prior charges and "the prosecution had no obligation to turn over the [prior arrest] information." *Id.* at 1516-1517.

The Tenth Circuit rejected a due diligence exception, noting that while a prosecutor's disclosure of items already known by the defense may sometimes be cumulative, the "obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge." *Id.* at 1517. The court explicitly disagreed with the Eleventh Circuit precedents and held that "[t]he only relevant inquiry ... is whether the information is 'exculpatory.'" The holding in *Banks* has been followed in *Hatch v. State of Oklahoma*, 58 F.3d 1447, 1470 n. 17 (10th Cir. 1995), cert. den., 1996 U.S. LEXIS 3649 (court refused to "rely on the fact that the defense apparently was aware" of withheld information in determination of whether *Brady* violation occurred).

Several states have also rejected a flat ban on evidence which defendants knew of prior to trial or could have obtained from sources other than the government qualifying as "newly discovered" evidence, at least in the case of known but

unlocatable alibi witnesses. *See, State v. Ames*, 112 Idaho 144, 730 P.2d 1064, 1067 (Idaho App. 1986), *accord, State v. Caldwell*, 112 Idaho 748, 751, 735 P.2d 1059, 1062 (Idaho App. 1987); *State v. Slanaker*, 58 Wash. App. 161, 166-67, 791 P.2d 575, 578-79 (Wash. App. 1990). Indeed, older federal cases have held similarly with respect to witnesses who could not be found at the time of trial. *Amos v. U.S.*, 218 F.2d 44 (D.C.Cir. 1954); *Mejia v. U.S.*, 291 F.2d 198 (9th Cir. 1961).

This jurisdictional conflict has persisted for several years and, while grants of a new trial based upon newly discovered evidence may be comparatively rare, the issue often arises in lengthier habeas corpus proceedings, *see, e.g., Zeitvogel v. Delo*, 84 F.3d 276, 279-80 (8th Cir. 1996), and thus resolution of this conflict now is appropriate.

B. The Sixth Circuit's Due Diligence Exception Fundamentally Conflicts With This Court's Most Recent Explanation of the Requirements of *Brady v. Maryland*, 373 U.S. 83 (1963) and Due Process in *Kyles v. Whitley*, 115 S.Ct. 1555 (1995).

1. The judicially-created due diligence requirement may ordinarily be one of sound administration; it conserves judicial resources and preserves the finality of federal criminal judgments. When the newly discovered evidence is material, exculpatory evidence which was suppressed by the government, the last two elements of this test under Rule 33 of the Federal Rules of Criminal Procedure become premised on the constitutional guarantee of due process, and thus they become this Court's standard for disclosure of exculpatory evidence under *Brady v. Maryland*, most recently articulated in *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995).

2. As several circuits have recognized, the Rule 33 test thus is modified in cases of exculpatory evidence suppressed by the prosecution. *See, e.g., U.S. v. DeLuca*, 945 F.Supp. 409, 412 (D.C.R.I. 1996); *U.S. v. Stoddard*, 875 F.2d 1233, 1237-38 (6th Cir. 1989); *U.S. v. Schledwitz*, 86 F.3d 73, 75 (6th Cir. 1996)(Merritt, C. J., dissenting from denial of rehearing *en banc*)("different test is required when the new trial motion is based on evidence specifically requested by the defendant but knowingly withheld by the prosecution"); *U.S. v. Lloyd*, 71 F.3d 408, 410 (D.C. Cir. 1995)("the *Thompson* test does not apply where the evidence in question was not newly discovered, but was available to the prosecution at the time of trial, at least when the prosecution withheld that evidence in violation of due process standards under *Brady v. Maryland*"); *U.S. v. Duke*, 50 F.3d 571, 576-77 (8th Cir. 1995)("[w]here the newly discovered evidence raised in a §2255 motion comes from a neutral source and the prosecution did not know, or have reason to know, of its existence, the district court must apply a substantive standard that included five prerequisites... A standard more favorable to the defendant is applied, however if a *Brady* violation has occurred.")

This modification simply takes account of the well-recognized distinction this Court noted over two decades ago: "The fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial." *U.S. v. Agurs*, 427 U.S. 97, 111, 96 S.Ct. 2392, 2401, 49 L.Ed.2d 342 (1976).

3. While the last two elements of the test thus become the standard under Brady, what happens to the due diligence requirement of the test? Whether defendant's counsel used due diligence to obtain it bears no logical relation to whether its

suppression violated due process. If the evidence was suppressed by the government, defense counsel might or might not have used diligence to obtain it, depending upon whether counsel had any reason to believe that the evidence existed. See, e.g., *U.S. v. Sepulveda*, 15 F.3d 1216, 1219 (1st Cir. 1993)("defense may have a plausible argument that even if a diligent pretrial search had uncovered the state police records of the search and seizure of the [government witness's] funds, these facts would not have disclosed the supposed 'work it off' arrangement alleged"); *U.S. v. Ouimette*, 798 F.2d 47, 52 (2d Cir. 1986)(whether counsel used due diligence to discover evidence of police coercion against a prospective defense witness depended on when the alleged coercion occurred); *U.S. v. Duke*, 50 F.3d 571, 578 (8th Cir. 1995)(rejecting argument that defense counsel was not ineffective for accepting government's representation that informant had no arrest record because if "defense counsel acted reasonably in relying on the thoroughness of [the government's] background check without making further independent inquiry, we think it is reasonable for this court to conclude that the prosecution should have known of the falsity of [witness's] testimony").

4. This case presents a clear example of the problem. Petitioners' experts might very well have been able to find the articles, *had* petitioners' been provided the chemical synthesis formula upon which the government was basing its case. *See, e.g., U.S. v. DeLuca*, 945 F.Supp. 409, 413 (D.R.I. 1996)("in determining whether the [witness'] testimony was available to [defendant] at the time of trial with the exercise of due diligence, it is important to ascertain *when* [defendant] learned that their testimony would be relevant to his defense")(emphasis supplied). All the diligence in the world would not have enabled counsel to identify as relevant evidence about a process (such as the "Leuckhart" reaction) counsel did

not know, and could not have known without earlier disclosure of the relevant synthesis route, would be at issue in the case.

This Court rejected just such an argument from a state seeking "leeway," because it was "'difficult ... to know' from the 'perspective [of the prosecutor at] trial exactly what might become important later on." *Kyles v. Whitley*, 115 S.Ct. 1555, 1568 (1995). In explaining the "materiality" standard for *Brady* evidence, this Court noted the often contextual nature of exculpatory evidence, but reiterated that

> even if due process were thought to be violated by every failure to disclose an item of exculpatory or impeachment evidence ... the prosecutor would still be required to make judgment calls about what would count as favorable evidence, owing to the very fact that the character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record.

Id. Here, the critical nature of the evidence could not have been apparent prior to trial, as petitioners could not have imagined that the government would seek to prove their intent by reference to a chemical process which, upon research, would suggest just the opposite.

C. The Sixth Circuit's Due Diligence Exception is Wrong.

1. The due diligence exception may generally be a sound one as a matter of judicial administration in order to ensure finality and preclude relitigation of issues which could more accurately, easily and efficiently be addressed at trial. It may make sense in the context of easily obtainable evidence which

was not discovered because counsel made no effort to seek it. The exception, however, is not mandated by statute or by the Constitution - and of course it cannot vitiate either the Federal Rules of Criminal Procedure or the Constitution.

2. Its application in the context of material exculpatory evidence, moreover, produces a perverse result. The party with the obligation to ensure that exculpatory evidence is disclosed, the government, must decide not just whether the evidence is in fact exculpatory but, additionally, whether it could be obtained elsewhere through "due diligence." If the government is correct, any subsequent discovery of exculpatory information does not provide relief to the defendant, notwithstanding the defendant's having specifically requested such information prior to trial. If the government miscalculates, and the nondisclosed evidence is *not* available elsewhere through due diligence, how will the error ever come to light? The natural incentive, even for a prosecutor seeking to appropriately discharge his or her obligation to disclose *Brady* material, is to disclose *only* material that is *known to be unavailable* through the exercise of due diligence. *See, e.g., U.S. v. Kelly*, 35 F.3d 929, 937 (4th Cir. 1994)("The government maintains that the search warrant affidavit was not under seal, and therefore, no *Brady* violation occurred because defense counsel could have obtained it. However, the record before this court simply does not bear out this assertion.")

3. More troubling is the government's claim in such cases after the fact that, notwithstanding a failure on the part of counsel to use due diligence (*e.g.*, a reliance on non-disclosure by the government in response to a specific *Brady* request), counsel was nevertheless effective for relying on the government's response. *See, e.g., U.S. v. Duke*, 50 F.3d 571, 578, n.4 (8th Cir. 1995)("This is unfortunately not the first case

we have seen where the government has failed to successfully complete a routine background check [of its own witness]... We strongly condemn the government's haphazard approach to its own trial preparation and to its duty to serve and facilitate the truth-finding function of the courts"); *U.S. v. Bernal-Obeso*, 989 F.2d 331, 333-34 (9th Cir. 1993)("government stands uniquely positioned to guard against perfidy [of its cooperating witnesses]....[b]y its actions, the government can either contribute to or eliminate the problem"); *Siddiqi v. U.S.*, 98 F.3d 1427, 1438 (2d Cir. 1996)(When physician, charged with Medicare billing fraud, presented proof of having arranged coverage by another physician while he was away "sufficiently convincing for the government now to concede it, he was denied relief on the ground that the evidence would have been available before trial had due diligence been exercised. In response to his Section 2255 petition claiming the lack of due diligence constituted ineffective assistance of counsel, the government argues that he received effective assistance because, although there was coverage by [another physician], coverage is irrelevant. It takes no great flash of genius to conclude that something is wrong somewhere.")

In *Kyles v. Whitley*, this Court held that

> the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. This means that the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation ... the prosecution's responsibility for

> failing to disclose known favorable evidence rising to a material level of importance is inescapable.

115 S.Ct. at 1567-68. If this statement is to have any force, the government's obligation to disclose material, exculpatory evidence cannot be vitiated by reliance on "due diligence."[12]

Since, the opinion of the Sixth Circuit is contrary to this Court's holding in *Kyles*, this Court should grant review.

D. The Sixth Circuit's Application of the Due Diligence Exception Promotes Prosecutorial "Foul Play."

As observed in the argument above, central to this petition for a writ of certiorari is balance between the prosecutor's duty to disclose and the defense's duty to independently investigate. Central to that balance in this case is both the nature of the case, entirely circumstantial, and the nature of the evidence withheld, the synthesis route.

In reversing the district court's grant of the judgment of acquittal, the Sixth Circuit did not question the wholly circumstantial nature of the case nor that no MDA or other illegal chemical substance was found. It did not contest that no formula or recipe for making MDA was found nor that no intermediate products of the chemical process to make MDA

---

[12]One court appears to have taken this Court at its word in Kyles. *See, U.S. v. Sebring*, 44 M.J. 805 (Ct. Mil. App. 1996)(government's failure to disclose "data alteration" at Navy drug testing lab which tested sample used to convict defendant of drug use, despite specific request for "inspections, examinations, validations or other verification" of lab work, violated *Brady* because prosecutor failed to use "due diligence" to search for favorable evidence).

were found. It simply held that sufficient inferences could be drawn from the evidence to support the jury's verdict. Appendix at 25a-28a. Therefore, the entire case depended upon the government's proving that with a myriad of chemicals that could be combined in thousands of ways the defendants intended to make a specific substance, MDA.

Prior to trial the defense was informed that the two chemicals they possessed that could be used to make MDA were isosafrole and formamide. They were not informed how the government proposed they would make MDA or whether these chemicals would be used together or separately. Knowing these two chemicals could be used for thousands of products and presuming that MDA could be made in numerous ways the defendants and their experts had little information upon which to search for impeaching information. Meanwhile, the prosecution, knowing that an agent in its North Central Lab had written an article indicating that its proposed synthesis route in this case was an unlikely route for a clandestine lab and knowing the synthesis route required the complex "Leuckhart" reaction for which the defendants clearly lacked the necessary equipment, repeatedly denied the defense access to the synthesis route by which the prosecution intended to prove intent.

Prior to trial the defense took at face value the prosecutor's protestations that the synthesis route was "DEA Sensitive" and thus should not be disclosed. As a result the defense continually narrowed its requests seeking only that which appeared absolutely essential to the preparation of the defense. Still the prosecutor persisted in his refusal to provide this essential information to the defense. *See*, Motion to Compel and its attachments, J.A. 144 - 157; Response to Motion to Compel, J.A. 159 - 167.

After the trial started and jeopardy attached, the defense obtained this synthesis route under a protective order which among its very restrictive provisions stated:

> 1. The right to access of said portions of said manual shall be limited to counsel for defendants, the Court, and to expert witnesses, paralegals, secretaries, clerks and technicians in their employ.
>
> 2. No person having access to said portions of said manual for purposes of this case shall make public disclosure of, or disclosure to, any other person not indicated in paragraph 1 of this order of any information or material from said manual without further order of the Court.
>
> 4. Violation of any of these conditions shall subject violators to punishment for criminal contempt by this Court.

Appendix at 34a, 35a. Needless to say, these restrictions, including not allowing the defendants themselves to have the document, and the threat of criminal contempt, not to mention the fact that the trial was in progress, certainly dampened the ability to the defense to interpret the document and research for information that might impeach the government's chemist.[13]

---

[13]As is was the testimony of the chemist, most of which was cross-examination, lasted the better part of two days. TT at 3-5 (September 9) to 4-74 (September 10). However, this was mostly generic cross-examination involving general knowledge and theory of chemistry. What was lacking was the stiletto sharp cross that would have resulted from the materials discovered after trial based upon the ability to thoroughly research starting with the synthesis route that had been withheld by the government.

It is also fundamental to any inquiry on the delayed disclosure of this critical information, that the synthesis route was discussed and introduced into evidence during the trial and that the synthesis route was entered into the joint appendix in the Sixth Circuit without being placed under seal. J.A. at 101-103. Thus, as soon as the prosecution needed the document to present its case and appeal, it somehow suddenly lost its "DEA Sensitive" status, when it could no longer be effectively used by the defense to develop adequate impeachment material.

This Court has long held that a prosecutor may "strike hard blows" but not "foul ones". *United States v. Ash,* 413 U.S. 300, 320 (1973), citing, Berger *v. United States,* 295 U.S. 78, 88 (1935). At the heart of this Court's decisions in *Brady* and *Kyles* is the requirement that the prosecutor play fair. The decision of the Sixth Circuit in the instant case encourages just the opposite. Read by a canny prosecutor, the decision below stands for the proposition that by withholding exculpatory evidence until it is too late for the defense to effectively use the material the government can avoid a serious challenge to a weak circumstantial case without risking the grant of a new trial.

The decision below flies in the face of justice and should be reviewed by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1997

APPENDIX

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No. 95-5552.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE WESTERN
DISTRICT OF KENTUCKY

BUD RIGGINS and
DONALD McVEAN,

Defendants-Appellees.

_____/

BEFORE: KENNEDY and COLE, Circuit Judges; and

O'MALLEY, District Judge.*

PER CURIAM: The United States Government appeals the district court's order granting the defendants' motion for a new trial based on newly discovered evidence. For the following reasons, we reverse.

I.

Following a trial by jury, defendants Bud Riggins and Donald McVean were convicted of conspiracy and attempt to manufacture a hallucinogen known as "3, 4-methylenedioxyamphetamine" ("MDA") in violation of 21 U.S.C. § 846 and possession of triple-neck round-bottom flasks

[2]

with intent to manufacture MDA in violation of 21 U.S.C. § 843(a)(6). Pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure, the defendants moved the district court for a judgment of acquittal or, in the alternative, for a new trial. On December 11, 1992, the district court granted the motion for judgment of acquittal, concluding that the defendants' convictions were not supported by sufficient evidence. Upon the government's appeal, this court reversed the decision of the district court in an opinion filed on February 23, 1994. The defendants then unsuccessfully sought a writ of certiorari in the United States Supreme Court. *See United States v. Riggins*, No. 93-5075, 1994 WL 54307 (6th Cir. Feb. 23, 1994), *cert. denied*, 115 S.Ct. 187 (1994). Following the denial of the

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*The Honorable Kathleen M. O'Malley, United States District Judge for the Nothern District of Ohio, sitting by designation.

defendants' certiorari petition, this court, pursuant to its earlier disposition of the case, issued its mandate on January 9, 1995, remanding the case to the district court for further proceedings.

Less than two months later, on February 23, 1995, the defendants filed a motion for a new trial on the basis of newly discovered evidence. In their motion, the defendants claimed that they had recently discovered various scientific articles which, if presented at their trial, would have rebutted the testimony of an expert witness for the government. After hearing testimony as to the probative value of the defendants' proffered evidence, the district court granted the motion. The government appeals the district court's order.

II.

The government first argues that the district court did not have jurisdiction to grant the defendants' motion for a new trial. Whether a trial court has jurisdiction to grant a motion for a new trial is a question of law subject to de novo review. *United States v. Haddock*, 956 F.2d 1534, 1544

[3]

(10th Cir.), *reh'g granted on other grounds*, 961 F.2d 933 (10th Cir.1992); *United States v. Walgren*, 885 F.2d 1417, 1426 (9th Cir.1989).

This Court reversed the district court's grant of the defendants' motion for judgment of acquittal, and remanded the case for further proceedings. Rule 33, which governs motions for a new trial, provides that "[a] motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment." Fed.R.Crim.P. 33. The district court has not yet sentenced the defendants, so there has been no final judgment. E.g., *United States v. Bratcher*, 833 F.2d 69, 71 (6th Cir.1987) ("Final

judgment in a criminal case means sentence. The sentence is the judgment.") (citation omitted). Because the defendants' motion was filed before final judgment, it complies with Rule 33's time constraints; therefore, the district court had jurisdiction to grant the defendants' motion.

III.

The government next contends that, even if the district court had jurisdiction to entertain the motion, it abused its discretion by granting the motion for a new trial on the basis of newly discovered evidence. A district court may grant a new trial if required in the interests of justice, *United States v. Glover*, 21 F.3d 133, 138 (6th Cir.1994), and the decision to grant or deny a motion for a new trial rests within the district court's discretion. *United States v. Braggs*, 23 F.3d 1047, 1050 (6th Cir.1994); *United States v. Seago*, 930 F.2d 482, 488 (6th Cir.1991). "An abuse of discretion exists when the reviewing court is firmly convinced that a mistake has been made." *United States v. Winston*, 37 F.3d 235, 239 (6th Cir.1994) (citation omitted). Motions for a new

[4]

trial based upon newly discovered evidence are disfavored, however, and should be granted with caution. *United States v. O'Dell*, 805 F.2d 637, 640 (6th Cir.1986). In the present case, we conclude that the district court abused its discretion by granting the defendants' motion for a new trial because the defendants failed to show that they could not have located the alleged newly discovered evidence before or during trial. *Braggs*, 23 F.3d at 1050; *Seago*, 930 F.2d at 488; *O'Dell*, 805 F.2d at 640.

A motion for a new trial based on newly discovered evidence should not be granted unless the defendant satisfies the requirements enumerated in *United States v. O'Dell*, 805

F.2d at 640. In order to satisfy the four prongs of the *O'Dell* test, the defendant must establish that: (1) the new evidence was discovered after trial; (2) the evidence could not have been discovered earlier with due diligence; (3) the evidence is material and not merely cumulative or impeaching; and (4) the evidence would likely produce an acquittal. *Id.*; *accord United States v. Oliver*, 683 F.2d 224, 228 (7th Cir.1982); *United States v. Wright*, 625 F.2d 1017, 1019 (1st Cir.1980); *United States v. Antone*, 603 F.2d 566, 568-69 (5th Cir.1979).

The defendants argue that they are entitled to a new trial based on various scientific articles which they did not discover until after they were convicted. Specifically, the defendants argue that these articles could have been used to rebut the testimony of Odiest Washington, a chemist employed by the Drug Enforcement Administration and one of the government's chief witnesses, concerning the defendants' intended method for processing MDA.

[5]

The articles presented by the defendants were published at least two years before their trial; one of the articles was published in 1990, another in 1954 and the last article in 1956. Additionally, one of the defendants' experts, testifying solely in relation to defendants' motion for a new trial, acknowledged that computerized research systems for chemical abstracts have been in "real high prominence" since 1992, the year of the defendants' trial, and that he could have located the relevant articles by using such a system. Furthermore, the defendants retained two chemists to present expert testimony at trial as to the methods for processing MDA. Presumably, because these experts were retained to testify as to the manufacturing of MDA, they could have identified any relevant articles on that

process in preparation for their trial testimony.

We fail to see why the defendants could not, with due diligence, discover these or other articles that would assist them in rebutting the Washington's testimony. The defendants maintain that they could not have located the articles earlier because the government waited until the start of trial to reveal Washington's theory as to how the defendants processed the MDA. Thus, the defendants claim that their defense experts had insufficient time to study the synthesis model or locate the articles necessary to discredit Washington's theory. However, if the government's delay in disclosing the synthesis model left the defendants unprepared to rebut that part of the government's case, the defendants' proper course of conduct would have been to request a continuance. Any holding to the contrary would allow criminal defendants to research academic literature after their convictions and move for new trials whenever their research revealed useful articles.

[6]

Because the defendants failed to demonstrate that the articles in question could not have been discovered earlier with due diligence, we hold that the district court abused its discretion by granting the defendants' motion for a new trial. *See O'Dell*, 805 F.2d at 640.

IV.

For the above reasons, we **REVERSE** the district court's order granting the defendants' motion for a new trial based on newly discovered evidence, and **REMAND** this case for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

CRIMINAL ACTION NO. CR 91-00023-01 BG(W)

UNITED STATES OF AMERICA
V.
BUD RIGGINS and
DONALD McVEAN

ORDER

This cause came on to be heard upon the motion for a new trial of defendants Riggins and McVean filed September 24, 1992, and the Defendants' Second Motion for a New Trial filed February 23, 1995. Defendants' original motion was in the alternative to a motion for a judgment of acquittal notwithstanding the verdict of the jury. The Court granted the motion for JNOV finding the evidence insufficient to convict the defendants of conspiracy to manufacture the controlled substance MDA, attempting to manufacture the controlled substance MDA, and possession of Triple-neck round bottom flasks with intent to the manufacture the controlled substance MDA. The Court of Appeals for the Sixth Circuit reversed and remanded the case, holding that a reasonable jury could have found on the basis of circumstantial evidence presented, that the defendants were guilty. That decision is the law of the case.

However, a different question is presented by the motions now before the Court. The U.S. Attorney refused discovery of the synthesis route on which the indictment relied in charging that defendants' possession of certain precursor chemicals and paraphernalia was evidence of intent to manufacture MDA. In

a pretrial conference telephone call, this Court indicated that it favored open disclosure, without knowing the importance or significance of the requested discovery. On the basis of the Court's indication, the government and defense entered into a protective order and the document was produced on Thursday, September 3, 1992, according to the U.S. Attorney. Defense attorney says he did not receive it until the trial began on Tuesday after the Labor Day holiday, September 8, 1992. Both are probably correct in consideration of the mailing time from Louisville to Nashville with an intervening federal holiday.

Since the trial, defense counsel has located articles and scientific materials that cast doubt on the testimony of the DEA chemist, Odiest Washington. These materials were not discovered by defense counsel before trial but were known to and referred to by Odiest Washington. Disclosure of the synthesis route relied on by the DEA and chemist Washington at a reasonable time prior to trial would have allowed defense counsel and his experts to locate these materials and cast doubt upon the testimony of Mr. Washington through cross examination and through counter expert testimony. In a purely circumstantial case, as this was, this Court cannot say that the additional attack upon the government's key witness might well have changed the outcome. In fairness, the defendants deserve the opportunity to make that effort. In the interest of justice a new trial is required.

Furthermore, the failure to disclose may well have violated Brady and Agurs requirements for exculpatory materials. Brady v. Maryland, 3737 U.S. 83 (1963), U.S. v. Agurs, 427 U.S. 97 (1976).

The defendants were probably doing something illegal. But they are not charged with doing "something illegal." They are

charged with conspiracy to make MDA which is a very specific chemical formulation made in a very specific way. The refusal to disclose in a timely fashion by the government in this case inhibited the defendants' ability to defend the government's allegations.

A new trial is ordered.

[Signed]

Thomas A. Wiseman, Jr.
U.S. District Judge

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Nos. 93-5075; 93-5076.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
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UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

BUD RIGGINS and DONALD McVEAN,

Defendants-Appellees.

_____/

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Before: GUY and SILER, Circuit Judges; and CHURCHILL, Senior District Judge.*

*The Honorable James P. Churchill, United States District Court for the Eastern District of Michigan, sitting by designation.

PER CURIAM. After a jury trial, defendants were convicted of conspiracy and attempt to manufacture a controlled substance, in violation of 21 U.S.C. § 846, as well as possession of triple-neck round-bottom flasks with intent to manufacture a controlled substance, in violation of 21 U.S.C. § 843(a)(6). Defendants filed a post-trial Rule 29 motion for judgment of acquittal, which the district court granted. The government now challenges the court's decision. Finding that a reasonable jury could have concluded that defendants' conduct satisfied, beyond a reasonable doubt, the elements of the charged offenses, we reverse and remand.

[2]

I.

In May 1991, Bud Riggins placed an order for ten kilograms of isosafrole and twenty liters of methanol with Eastman Fine Chemicals ("Eastman") of Rochester, New York. For numerous reasons, Riggins's isosafrole order aroused the suspicion of Richard Hapeman, Eastman's manager of quality assurance. For instance, isosafrole was, at the time, a chemical found on the DEA's " 'watch list,' an informal list of chemicals often used illegally which is published to suppliers."[1] In addition, the order was far larger than standard orders, which typically do not exceed one kilogram. Hapeman also noted that Riggins did not appear to be using a business address, and that the business Riggins had listed, Logan Ag Lab & Supply, had never before placed an order with Eastman. Furthermore, Riggins initially informed Hapeman that he wanted the

[1]Isosafrole does have some legitimate uses. It can be used, for example, as part of the manufacturing process for flavorings or fragrances.

chemicals shipped COD, a request that Hapeman could not honor given company policy. That Riggins would decide to initiate dealings with Eastman at that point seemed particularly strange to Hapeman, especially since, as Hapeman surmised, Riggins could have sought out other suppliers that were not only geographically closer to him, but also could offer a better price.

Dubious as to Riggins's intentions, Hapeman sought and obtained Riggins's written assurance that the chemicals would not be used in any food or drug or in a residential setting. Hapeman also contacted the DEA, notifying the agency as to his suspicions. The case was then referred to the DEA office in Louisville, Kentucky. Louisville DEA agents contacted the DEA laboratory in Chicago and were informed that isosafrole is a

[3]

precursor to the manufacture of 3, 4 methylenedioxyamphetamine ("MDA"), a schedule I hallucinogen under 21 U.S.C. § 812.

After getting confirmation from Eastman that Riggins had indeed placed the order in question, Louisville DEA Agent Gary Tennant decided to make a controlled delivery of the chemicals. Although a perusal of the local phone book did not reveal a phone number for either Riggins or the Logan Ag Lab & Supply Company, Tennant did manage to find a number to call by consulting various shipping documents. The individual who answered the call, "Don," instructed that the delivery be made to an airplane hanger on Riggins's farm in Logan County, Kentucky.

After the isosafrole package had been equipped with a beeper transmitting device, a delivery for the full amount under

Riggins's order took place on June 10, 1991. A person identifying himself as Clarence Gamble[2] accepted the delivery. As the delivery was being made, Tennant noticed a "distinctive chemical smell," which he associated with acetic anhydride, a substance used in the production of amphetamines. The DEA continued their surveillance of the area for nearly 40 hours.

On June 11, 1991, the DEA, accompanied by state and local police, executed a search of the hanger and the surrounding area. As the investigators arrived on the scene, Riggins remarked: "[Y]ou are here about them chemicals ain't you." (App. 234.) He then informed the agents that he had removed the isosafrole and methanol from the hanger to a residence on the property. At the time, the residence, though owned by Riggins, was occupied by Donald McVean, a friend and business associate of Riggins.

[4]

During the search of the hanger, DEA Agent Arnold Fitzgerald, much as Tennant had done the day before, noticed the smell of acetic anhydride.[3] The search did, in fact, uncover acetic anhydride as well as hydrobromic acid and 11 marijuana plants. Perhaps as revealing as what the agents did find was what they did not find: "There was no evidence found indicating the existence of a legitimate chemical business. "There was no evidence of the presence of fire safety equipment or use of safety storage principles."

---

[2]According to Riggins and McVean, Gamble was not a Logan Ag employee, but rather, a farmhand who had no connection to the company.

[3]Citing the testimony of Odest Washington, Riggins and McVean dispute the contention that the hanger smelled of acetic anhydride. Washington testified that, since the hanger was ventilated and the chemicals were in a sealed condition, it would have been difficult for the smell of the substance to have permeated the hanger.

The agents also searched Riggins's pick-up truck, which was parked outside the hanger. In the back seat, they found a book entitled "Drug Manufacturing for Fun and Profit." While the book did not include a recipe for MDA, it did devote a chapter to the manufacture of dimethyltryptomine, or "DMT," a controlled substance manufactured in much the same way as MDA.

The most plentiful source of evidence turned out to be Riggins's residence, located in a large clearing at a "considerable distance from any other building" on the farm. While the agents left the premises to secure a search warrant for the residence, McVean was permitted to remain inside unattended for approximately 30 to 40 minutes. When the agents returned,[4] and immediately upon entering the residence, Tennant and Fitzgerald detected "a very pungent and strong smell of ether."[5]

[5]

A thorough search ensued after the agents ventilated the residence. In the living room, the agents noted the following "scattered about" items:

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[4]Upon seeing the agents, McVean is alleged to have asked Riggins: "[B]oss, boss, what do you want me to do." (App. 236.) Riggins responded: "[J]ust ... shut up." (Id.)

[5]Ether is "a solvent commonly used in chemical synthesis including the manufacture of illegal drugs." Again, Riggins and McVean claim that the agents were tricked by their senses. If ether, a highly explosive solvent, had been present in the air, they maintain, McVean would not have lit a cigarette while in the residence. Riggins and McVean also note that the agents reported no side effects (e.g., nausea, headaches) commonly associated with the inhalation of ether.

Isosafrole--(10) 1 kilogram bottles--full; (2) 500 milliliter bottles--full and ½ full
Methanol--(1) 20 liter metal can--full
Ethyl Alcohol--(2) 4 liter bottles--full and ½ full
Sulfuric Acid--(1) 6 ½ liter bottle--full and (1) 2 ½ liter bottle-- ½ full
Hydrogen Peroxide 30%--(5) 500 milliliter bottles--full; (1) 4 liter glass bottle-- ½ full
Ethyl Ether (EM)--(10) 1 liter bottles--(9) full; (1) ½ full
Ethyl Ether (Fischer)--(1) 4 liter bottle-- ½ full
Alumina Activated--(1) 2 ½ liter bottle--full
Toluene--(1) 4 liter bottle--full
Formic Acid 88%--(4) 4 liter plastic bottles--3 1/4 full
Formic Acid--(2) 2/5 liter plastic bottles--full
Aluminum Metal--(2) 500 milligram plastic bottles--full
Isopropyl 70%--(12) 1 pint bottles--full (Wal-Mart brand)
Isatoic Anhydride--(1) 500 gram bottles--full
Muriatic Acid--(1) 1 gallon plastic bottle--full
Chromium Trioxide--(1) 1 liter bottle--full
Sodium Acetate--(1) 25 pound plastic bottle

The agents also discovered (3) 3,000 milliliter single neck flasks; (1) 1,000 milliliter single neck flask; and (1) hot plate.

[6]

In addition to a Lyman 500 scale, an Ohaus GT 8000 scale and (2) lab thermometers, a search of the kitchen yielded:

Acetone[6]
Phosphoric Acid--(1) 2 ½ liter bottle-- 3/4 full

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[6]There is some dispute as to whether this substance was actually recovered. Riggins and McVean contend that the can that allegedly contained the acetone may have been empty.

Raney-Nickel[7]--(5) 100 gram metal containers--full (stored in refrigerator)
Chromium Trioxide--(1) 500 gram bottle-- ½ full
Inositol[8]
Empty Gelatine Capsules[9]--(2) plastic zip lock bags containing approximately 420

In a first floor bedroom, the agents found a computer that was in the process of printing out documents. These documents, Riggins and McVean contend, were catalogs that they had intended to send to companies in the chemical supply industry. A search of another bedroom netted the agents a loaded .38 caliber Smith & Wesson revolver. The revolver was found on a night stand beside a bed. McVean apparently had been using the room as his sleeping area.

The agents also searched the attic. The items found there were particularly noteworthy because they had been concealed behind a sheet of plywood. Once McVean

[7]

found out that the hiding place had been discovered, he said: "[O]h, shit."[10] The attic is where the agents located Riggins's

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[7]This substance is a reducing agent for illicit drugs and can be used in the manufacture of MDA.

[8]This powder is "mainly used in cutting [and thereby increasing the volume of] cocaine, methamphetamine, or other drugs." (App. 104.)

[9]These capsules provide one way of packaging MDA.

[10]Subsequently, as he was being transported to the Jefferson County Jail, McVean told Tennant that "if he had known he was going to jail he would have jumped out the back window, swam his ass up that creek and I would never have seen him again." (App. 240.)

and McVean's most sizable cache:

Hydrochloric Acid--(1) 2 ½ liter bottle-- 3/4 full
Potassium Dichromate Merk--(1) 1 pound container--full
Ethyl Alcohol--(1) 4 liter bottle-- 1/10 full
Acetic Acid, Glacial--(1) 2 ½ liter bottle--full
Ethyl Acetate--(1) 4 liter bottle-- 3/4 full
Formamide--(1) 1 quart bottle--full
Diethyl Malonate--(1) 2 kilogram bottle-- ½ full
Phenylacetaldehyde--(2) 250 gram bottles-- 3/4 full each
1-Bromoethyl Benzene--(1) 100 gram bottle-- ½ full
N-Butyl Chloride--(1) 4 liter bottle--full
Nitric Acid--(2) 2 ½ liter bottles--full
Titrant Standard Potassium Hydroxide Alcoholic--(2) 500 ML bottle--full
Isosafrole--(3) 250 gram bottles--full
Isonitrosoproprophenone--(4) ½ quart bottles--full
Magnesium metal--(6) 500 gram bottles--full
Unknown liquid--(1) 4 liter bottle-- 1/4 full
Potassium Permanganate--(2) 500 gram bottles--full
Pyridine--(1) 1 one liter bottle-- 1/4 full

[8]

Phenylacetyl--(4) 100 gram bottles-- 3/4 full
Toluidine--(1) 500 gram bottle--full
Acetyl Acetone--(2) 500 milliliter bottles--full
Carbon Tetrachloride--(1) 500 milliliter bottle--full
Phenylacetonitrile--(1) 1 kilogram bottle--full
Methyl Iodide--(1) 100 milliliter bottle--full
Chromium Trioxide--(1) 500 gram bottle--full

The attic also produced the following paraphernalia:[11] (3)

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[11]A government witness would later estimate the total value of the paraphernalia--the best equipment available for making MDA--at

5,000 milliliter triple neck flasks, (3) 3,000 milliliter triple neck flasks, (4) 4,000 milliliter Pyrex beakers, (1) heating mantel (100 ml.), [12]separatory funnels, graduated cylinders, and condensers.

In March 1992, on the strength of the evidence obtained as a result of the searches detailed above, a federal grand jury returned a seven-count indictment naming Riggins and McVean as defendants. Specifically, the indictment listed several counts relating directly to the defendants' alleged MDA operation, including: conspiracy[13]

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approximately $20,000.

[12]The 100 ml. figure is probably an error. The correct designation is 1,000 ml.

[13]In *United States v. Lee*, this court noted:

> [T]o sustain a conviction [for conspiracy] under 21 U.S.C. § 846, the government is required to prove the existence of an agreement to violate the drug laws and that each conspirator knew of, intended to join, and participated in the conspiracy.
>
> "The existence of a criminal conspiracy need not be proved by direct evidence, a common plan may be inferred from circumstantial evidence." Circumstantial evidence standing alone can sustain the jury's verdict, and such circumstantial evidence need not remove every reasonable possibility except that of guilt. Moreover, once the existence of a conspiracy has been proven, only slight evidence is necessary to implicate a defendant. Further, proof of a formal agreement among the conspirators is unnecessary; a tacit or mutual understanding among the parties is sufficient to show a conspiracy. In addition, "[e]very member of the conspiracy need not be an active participant in every phase of the conspiracy, so long as he is a party to the general conspiratorial agreement."

991 F.2d 343, 348 (6th Cir.1993) (citations omitted).

[9]

(Count 1) and attempt[14] (Count 2) to manufacture MDA, in violation of 21 U.S.C. § 846; and possession of triple-neck round-bottom flasks with intent to manufacture MDA, in violation of 21 U.S.C. § 843(a)(6) [15] (Count 5). The indictment also contained two firearm charges: the use and carrying of a firearm, in violation of 18 U.S.C. § 924(c) (Count 3); and possession of a firearm by a convicted felon,[16] in violation of 18 U.S.C. § 922(g)(1) & (2) (Count 4). Finally, the indictment charged Riggins with two other drug-related offenses: manufacturing marijuana, in violation of 21 U.S.C. § 841 (Count 6); and possession with intent to distribute marijuana,

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[14]The two requisite elements of an attempt are (1) an intent to engage in criminal conduct and (2) the performance of one or more overt acts which constitute a substantial step towards the commission of the substantive offense." *United States v. Williams*, 704 F.2d 315, 321 (6th Cir.) (citations omitted), cert. denied, 464 U.S. 991 (1983).

[15]This provision states:

(a) Unlawful acts

It shall be unlawful for any person knowingly or intentionally--

....

(6) to possess any three-neck round-bottom flask, tableting machine, encapsulating machine, gelatin capsule, or equipment specially designed or modified to manufacture a controlled substance, with intent to manufacture a controlled substance except as authorized by this subchapter[.]

[16]Both Riggins and McVean had prior felony convictions to their credit. In fact, they met each other while they were serving prison time for their respective convictions. Their relationship would continue after they were released. The two even discussed pursuing a business venture together (the buying and selling of red oak). Eventually, McVean moved from Florida to Kentucky for the ostensible purpose of helping Riggins in the vegetable business.

in violation of 21 U.S.C. § 841(a)(1) (Count 7).

[10]

At trial, defendants attempted to portray their operation as a legitimate chemical supply and produce business, not an illicit drug manufacturing center. Testimony given during the trial established that the government tested samples of 10 out of the 41 substances found as a result of the search. The government's chemist, Odest Washington, opined that Riggins's farm provided an ideal setting for a clandestine laboratory because it was well hidden by trees. As to the chemicals found on the farm, Washington testified that eight of them could have been used to manufacture MDA: isosafrole, formamide, formic acid, sulfuric acid, hydrochloric acid, hydrogen peroxide, toluidine, acetone, and methanol.

Although virtually all of the ingredients to make MDA were thus present, Washington noted that several pieces of laboratory equipment vital to the manufacturing process were not. For instance, the government's search of Riggins's farm did not turn up a rheostat, a device for regulating temperature. In addition, the agents could not locate ring stands, clamps, or other apparatus designed to hold the equipment during synthesis. Finally, Washington observed that the heating mantle found in the attic of Riggins's residence would not have fit the 3,000 or 5,000 millimeter flasks that were also found in the attic.

At the close of the government's case and again, at the close of all the proof, defendants moved for a judgment of acquittal pursuant Fed.R.Crim.P. 29. On both occasions, the district court denied defendants' motions. Subsequently, the jury returned a not guilty verdict against Riggins on Counts 4, 6,

and 7. The jury did, however, convict both defendants on Counts 1, 2, and 5, and McVean on Count 4.[17]

[11]

Defendants filed a post-trial motion for a judgment of acquittal or, alternatively, for a new trial. At a sentencing hearing held on December 11, 1992, the court considered the facts that militated in the government's favor:

> [T]his is purely a circumstantial case, the circumstances favoring the verdict and the ... government's position.
>
> First of all and most damning and unexplained is the existence of the ... empty capsules. Although there was proof that these are readily available new and could be bought from any health food store, nevertheless they were there. And for what purpose remains unexplained.
>
> The fact that ten kilos isosaphrol and an unusually large order, whether one kilo is a normal amount, according to the testimony of the Eastman chemical man. The fact that Eastman finds they had never done business with this man before, didn't know who they were. The videotape of the premises certainly didn't look like any legitimate chemical supply business. No signs, no listed telephone, no license from the County Court Clerk to do business.
>
> The fact that isosaphrol is a necessary precursor to the manufacture of MDA; that methanol may be used as a solvent. Methanol was also purchased. They used it as a solvent in the process.

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[17]Count 3 had been dismissed by the court prior to consideration by the jury.

> The existence of the book didn't have a lot of probative value in the son's car. Well, Drug Manufacture [f]or Fun and Profit doesn't tell you how to make MDA. And that's what we're dealing with here. But it is a factor.
>
> No customer receipts, no business records, nothing that would be normally found at a legitimate business. The chemicals were concealed in the attic behind ... a piece of plywood. And, of course, we have the opinion of the DEA agent and chemist that they thought that's what was going on there. It was that this was attempted to manufacture MDA.

(App. 91-93.)

In the eyes of the court, the following facts weighed against the government:

> [T]here was no MDA on the premises, no evidence that they had ever completed the manufacture of MDA. Apparently there was no
>
> [12]
>
> residue in the bottles. Of if there were the DEA failed to check for it. And no evidence of any residue completed the manufacture. No other evidence of conspiracy or agreement or specific intent to manufacture MDA. It's all fairly circumstantial. There's no, no co-conspirator statements or any other evidence of specific intent. It's a matter of inference from the circumstances. There was no base present. The necessary acetone was absent. Mr. Washington's testimony about the substitution was terribly weak. I don't think Mr. Washington himself felt acetone was an adequate substitute. I watched him testify in that respect but nevertheless acetone was not present.
>
> There were no heating mantles to fit these 3,000 and

> 5,000 millimeter flasks. One that was present is too small for those. There was no rheostat for regulation of the temperature which is absolutely essential for the manufacture of MDA according to the testimony. There were lots of other chemicals present. Some 51 total chemicals were present when most of those were unnecessary for the production of MDA. There was no recipe for the manufacture of MDA.
>
> The testimony was that is a very complex procedure. All the chemicals present had other uses besides the manufacture of MDA.
>
> Now, for a conviction of conspiracy or for a conviction for intent it's not necessary that the act be completed, that MDA be finally manufactured or that they even have the ability to complete the effort to manufacture MDA. There are cases where the specific intent is proven, that the absence of essential ingredient is not faded. But in those cases there was, there was evidence, other evidence of specific intent rather than the mere inference of specific intent from the presence of the chemicals. And that's all we have here, counsel. Some of the necessary ingredients for manufacture of MDA were present.

(Id. at 93-95.) The court then added:

> The Court has come to the conclusion that the proof is insufficient to prove guilt beyond a reasonable doubt. Motion for judgment of acquittal counts one, two and five by both Mr. McVean and Mr. Riggins will be granted
>
> [13].

(Id. at 95.) The government now appeals from this decision of

the district court.[18]

II.

On appeal, the government asserts that the district court erred in granting defendants' motion for acquittal. In *United States v. Overmyer*, we discussed our standard of review pertaining to Rule 29 motions for acquittal:

> It is well settled that the test to be applied by a trial court in determining a defendant's motion for acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure is taking the evidence and inferences most favorably to the government, if there is such evidence therefrom to conclude that a reasonable mind might fairly find guilt beyond a reasonable doubt, the issue is for the jury. The Supreme Court has observed that the granting of a motion of acquittal, "... will be confined to cases where the prosecution's failure is clear."
>
> An appellate court, in reviewing a trial court's decision regarding a Rule 29 motion, applies the same principles to the record it has before it. Other circuits have indicated the use of the same test following the trial court's reversal of a guilty verdict pursuant to Rule 29(c).
>
> The 11th Circuit [has] stated the test for review of a verdict overturned by a judgment of acquittal as follows:
>
> > On a motion for judgment of acquittal, the court must view the evidence in the light most favorable to the verdict and, under that light, determine whether the evidence is sufficient to support the verdict. Thus, on this motion, the court assumes the truth of the evidence offered by the prosecution.

867 F.2d 937, 938-39 (6th Cir.) (citations omitted), cert.

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[18]The district court did not disturb McVean's conviction under Count 4, for which he received a 21-month prison term.

denied, 493 U.S. 813 (1989).[19]

[14]

Consistent with the requirement that we view the evidence in the light most favorable to the verdict, we hold that the facts of this case warrant reversal of the district court's decision. In reaching this conclusion, we are mindful of our standard of review. We do not approach this case as would the initial fact-finder; instead, our analysis must begin with the decision of the jury. If that decision is one which reasonably could have been reached, our task is complete; what this court would have determined or what the district court did, in fact, determine would thus be reduced to an irrelevancy.

The government produced circumstantial evidence from which the jury was asked to draw numerous inferences. That

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[19]The parties disagree as to the relationship of two Sixth Circuit cases, both of which speak to the applicable burden of proof. In the first case (relied upon by defendants), *United States v. Leon*, 534 F.2d 667, 677 (6th Cir.1976), the court stated: "Where the evidence as to an element of a crime is equally consistent with a theory of innocence as with a theory of guilt, that evidence necessarily fails to establish guilt beyond a reasonable doubt." As the government properly points out, however, we rejected this proposition in the later case of *United States v. Stone*, 748 F.2d 361, 362 (6th Cir.1984). In *Stone*, we stated: "[C]ircumstantial evidence alone can sustain a guilty verdict and that to do so, circumstantial evidence need not remove every reasonable hypothesis except that of guilt." *See also id.* at 363 ("It is not necessary that circumstantial evidence remove every reasonable hypothesis except that of guilt. To the extent that our previous decisions have indicated our approval of a contrary rule, they are rejected and overruled."). Our holding in *Stone* is consistent with the Supreme Court's rulings on the matter. *See, e.g., Holland v. United States*, 348 U.S. 121, 139-40 (1954).

the evidence was exclusively circumstantial is not fatal to the government's position so long as the evidence does not require too great a "leap of faith in order to support a conviction." *United States v. White*, 932 F.2d 588, 590 (6th Cir.1991). *See also United States v. Stone*, 748 F.2d 361, 362-63 (6th Cir.1984) ("[C]ircumstantial evidence alone can sustain a guilty verdict and ... to do so, circumstantial evidence need not remove every reasonable hypothesis except that of guilt."). Here, the government contends that sufficient evidence supports a jury verdict in its favor, the most "damning" of which is perhaps defendants' concealment of chemicals and supplies behind a sheet of plywood in Riggins's attic. After all, "[h]iding, disguising, repackaging, or otherwise concealing supplies is evidence of guilt." *See*

[15]

United States v. Wagner, 884 F.2d 1090 (8th Cir.1989), *cert. denied*, 494 U.S. 1088 (1990)).

Other pieces of evidence that, according to the government, support defendants' convictions are as follows: (1) that defendants collected nearly all of the chemicals essential to the manufacture of MDA, *see, e.g.*, *United States v. Packer*, 730 F.2d 1151 (8th Cir.1984); (2) that defendants purchased certain chemicals in amounts inconsistent with personal use, *see, e.g.*, *United States v. Monroe*, 866 F.2d 1357 (11th Cir.1989); (3) that defendants purchased expensive equipment capable of being utilized in the drug manufacturing process, *see, e.g.*, *United States v. Johnson*, 767 F.2d 673 (10th Cir.1985); (4) that Riggins used cash, as opposed to checks, for company transactions, *see, e.g., id.*; (5) that Riggins could presumably have gotten isosafrole at a better price from distributors nearer to his "business" than Eastman, *see, e.g.*, *United States v. Fooladi*, 703 F.2d 180 (5th Cir.1983); (6) that Riggins purchased chemicals from more than one supplier, *see, e.g.*,

Packer, 730 F.2d 1151; (7) that scant evidence existed suggesting that Logan Ag Lab & Supply was, in fact, a legitimate business, *see, e.g.*, *United States v. Settegast*, 755 F.2d 1117 (5th Cir.1985); (8) that delivery of chemicals was made to a nonbusiness, residential location, *see, e.g.*, *United States v. Williams*, 603 F.2d 1168 (5th Cir.1979), *cert. denied*, 444 U.S. 1024 (1980); (9) that Hapeman, Eastman's representative, had, himself, become suspicious, *see, e.g.*, *United States v. Hare*, 772 F.2d 139, 142 (5th Cir.1985); (10) that DEA agents detected the odor of ether upon entering Riggins's residence, *see, e.g.*, *United States v. Mueller*, 902 F.2d 336 (5th Cir.1990); (11) that a fully-loaded revolver was recovered from McVean's bedroom, *see, e.g.*, *United States v. Sullivan*, 919 F.2d 1403 (10th Cir.1990); and (12) that the book entitled

[16]

"Drug Manufacturing for Fun and Profit" was found on Riggins's premises, *see, e.g.*, *United States v. Green*, 548 F.2d 1261 (6th Cir.1977).[20]

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[20]Defendants argue that the cases relied upon by the government are inapposite because, for the most part, they deal only with determinations of "probable cause for a search and not sufficiency of the evidence beyond a reasonable doubt." (Appellee's Brief at 26.) Defendants' argument, however, is misguided, for the government cites the cases only to support the various inferences the jury apparently drew in analyzing the evidence before it. In the government's words:

> It makes no difference whether, in the particular case, the ultimate issue was probable cause or proof beyond a reasonable doubt. Riggins and McVean cannot credibly argue that the evidence may support a particular inference for probable cause and at the same time [argue] that it would be impermissible for the jury to draw the same inference from the same evidence. The point, again, is that the evidence cited can support the inference the United States advocates.

Counterbalanced against these facts, defendants contend, are those acknowledged by the district court during defendants' sentencing hearing, including the absence of an MDA recipe, any trace of the substance itself, and a few devices essential to the manufacturing process. Moreover, as defendants assert: "The critical items missing in this case are any advance surveillance to suggest that there were any conversations or statements made by Riggins or McVean suggesting that they intended to manufacture MDA or any other illegal drug."

Notwithstanding defendants' assertions, we feel that the facts of the instant case do not justify the granting of a Rule 29 motion. Although the evidence relied upon by defendants undoubtedly has some exculpatory value, the question remains whether a reasonable juror must find that such evidence creates a reasonable doubt as to defendants' guilt. Given the dearth of evidence substantiating defendants' claim that they were engaged in a legitimate business enterprise, coupled with the chemicals and related

[17]

paraphernalia found on Riggins's premises, we conclude that a reasonable juror could come to the same conclusion previously reached by the actual jury here.[21]

III.

Finally, McVean argues that--irrespective of the government's case against Riggins--the evidence against him is

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[21]In reaching our decision, we offer no opinion as to whether one single fact, standing alone, would be sufficient to sustain defendants' convictions; instead, our decision is based on an evaluation of the facts in their entirety.

insufficient to justify convictions for Counts 1, 2, and 5. McVean claims that "there was no evidence presented from which a jury could infer either that [he] had knowledge of the conspiracy and with that knowledge voluntar[ily] joined the conspiracy or had the specific intent to violate the statute."

McVean's argument, however, is without merit. While the evidence may have established that McVean was not the chief conspirator, it did clearly prove that he was a co-conspirator. McVean was occupying the residence in which the DEA agents found most of the incriminating material. In addition, he was in possession of the revolver found in one of the bedrooms. Furthermore, McVean made several comments suggesting his knowledge of the illegitimate nature of his association with Riggins. On one occasion, as noted above, he exclaimed, "oh, shit," when agents discovered the stash that had been concealed in the attic. And as McVean was being transported to the local jail after his arrest, Agent Tennant testified that McVean remarked "if he had known that he was going to jail he would have jumped out the back window, swam his ass up that creek and [the authorities] would have never seen him again." (App. 140.)

[18]

In short, the jury had before it enough evidence from which to infer McVean's knowledge of and participation in a conspiracy to commit certain federal drug offenses.

Accordingly, the decision of the district court granting defendants' motion for a judgment of acquittal on Counts 1, 2, and 5 is **REVERSED**, and this case is **REMANDED** for further sentencing proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

CRIMINAL ACTION NO. CR 91-00023-01 BG(W)

UNITED STATES OF AMERICA
V.
BUD RIGGINS

JUDGMENT OF ACQUITTAL

This action was called in open Court on September 8, 9, 10, 11, and 15, 1992, for a jury trial. Mr. Mark Miller, Assistant U.S. Attorney, appeared for the United States of America; the defendant Bud Riggins was represented by Mr. Donald E. Dawson, his retained counsel.

The jury returned a verdict of guilty as to the defendant Bud Riggins on Count 1, Count 2, and Count 5 of the Superseding Indictment and not guilty as to Count 4, Count 6, and Count 7 of the Superseding Indictment. Count 3 of the Superseding Indictment was dismissed by the Court prior to consideration by the jury.

The Court set sentencing for December 11, 1992, at which time post-trial motions were also heard.

The Court heard from counsel on Riggins' Motion for Judgment of Acquittal and/or New Trial. The Court reviewed the evidence in favor of the jury verdict and also the evidence which weighed against the jury verdict. The Court was of the opinion that taking the proof in the light most favorable to the government, the proof was insufficient to establish guilt beyond

a reasonable doubt, and no reasonable jury could find guilt beyond a reasonable doubt.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the defendant, Bud Riggins' Motion for Judgment of Acquittal is granted and all charges in the original indictment and the superseding indictment against the defendant are dismissed.

IT IS FURTHER ORDERED that the defendant be placed on a $100,000 property bond secured by the property owned by Ms. Willie A. Riggins and with Ms. Willie A. Riggins signing as surety on said bond to secure the appearance of the defendant pending conclusion of any appeal that might be filed.

This the *29* day of *Dec*, 1992.

[Signed]

Thomas A. Wiseman, Judge
United States District Court
Sitting by designation

[Entered 1/5/92]

No. 95-5552

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
MAR 21 1997
LEONARD GREEN, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v. **ORDER**

BUD RIGGINS AND DONALD MCVEAN,

Defendants-Appellees.

BEFORE: KENNEDY and COLE, Circuit Judges; and O'MALLEY, * District Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing

and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

[Signed]

Leonard Green, Clerk

*Hon. Kathleen M. O'Malley, United States District Judge for the Northern District of Ohio, sitting by designation.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

UNITED STATES OF AMERICA PLAINTIFF

vs. CRIMINAL ACTION NO. CR 91-00023-BG(W)

BUD RIGGINS, ET AL. DEFENDANTS

PROTECTIVE ORDER

This matter coming on for hearing on motin of defendants Riggins and McVean to compel the United States to provide documents and the Court having considered the motions, counsel's memoranda in suport thereof, and the arguments and representations of counsel, and having determined those portions of the United States Drug Enforcement Agency's Clandestine Laboratory Manual which it considers essential for defendants'defense, orders that the United States Drug Enforcement Agency make the determined portions available to counsel for the defendant, on the following conditions only:

1. The right to access of said portions of said manual shall be limited to counsel for defendants, the Court, and to expert witnesses, paralegals, secretaries, clerks and technicians in their employ.

2. No person having access to said portions of said manual for purposes of this case shall make public disclosure of, or disclosure to, any other person not indicated in paragraph 1 of this order of any information or material from said manual without further order of the Court.

3. All portions or said manual turned over or disclosed to defense counsel by direction of this Court shall be returned to the United States Drug Enforcement Agency, or its authorized representative immediately upon conclusion of trial or appellate proceedings, whichever date is later, and that defense counsel's files and those of his expert witnesses and/or assistants be purged of any copies of said portions at that time.

4. Violation of any of these conditions shall subject violators to punishment for criminal contempt by this Court.

[signed]

THOMAS A. WISEMAN, JR JUDGE
UNITED STATES DISTRICT COURT

DATE: *9/3/92*

cc: United States Attorney
Counsel of Record

ENTERED
9/8/92
JESSE W, CRIDER, CLERK
BY [signed]
DEPUTY CLERK